between the defect and the injury. To recover, a plaintiff need only prove that he or she was injured by an ordinary semi-automatic firearm, lawfully manufactured and marketed elsewhere, that the District has defined as an "assault weapon" or "machine gun."

In essence, the District has imposed liability upon sister-State businesses for the simple act of manufacturing, selling or importing certain firearms in States where it is lawful for those businesses to do so. This is no less an intrusion into the sovereignty of sister States than what this Court invalidated in *Gore* and *Campbell*. Stated simply, "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *Campbell*, 538 U.S. at 421. Because the District's imposition of absolute liability establishes economic sanctions for the lawful manufacture, sale, or importation of the firearms throughout the United States, it cannot be reconciled with *Gore*'s admonition that no State can constitutionally "impose sanctions ... to deter conduct that is lawful in other jurisdictions." 517 U.S. at 573.

The District, of course, may reasonably regulate any manufacturers or dealers that engage in commerce within the District, even if there is some regulatory impact on the companies' business elsewhere. And the District is entitled to pursue its legitimate interests in controlling criminal activity within its borders. It cannot, however, do so at the expense of the sovereignty of other States. By imposing liability upon sister-State businesses for having done nothing more than pursue economic activity that is legal in those sister States, the District seeks to override the policies of other sovereign States regarding conduct within their borders. Because the District's Act seeks to control the internal affairs of other States, it should be invalidated.

II. THIS COURT SHOULD REVIEW THE ACT BECAUSE IT VIOLATES THE COMMERCE CLAUSE

The District's Act is prohibited not only by principles of state sovereignty and comity, but also by the allocation of power between the national government and the States. Specifically, the Commerce Clause makes clear that the power to regulate interstate commerce rests with the United States Congress, not with the District or any one State.

The Commerce Clause provides that "[t]he Congress shall have Power ... [t]o regulate Commerce ... among the several States." U.S. CONST. Art. I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992); *Welton v. Missouri*, 91 U.S. 275 (1876)).

The Act is unconstitutional because it impermissibly regulates lawful commerce occurring wholly (and necessarily) outside the District's borders. Where a statute has such "extraterritorial reach" – that is, the statute has the practical effect of controlling conduct beyond the boundaries of the State – it is *per se* unconstitutional. *Healy*, 491 U.S. at 336.

The purpose of the Commerce Clause was to correct one of the most glaring failures of the Articles of Confederation: the imposition of laws by several States that substantially impeded the interstate flow of commerce. As this Court has noted, "the Framers granted Congress plenary authority over interstate commerce in "the conviction that in order to succeed, the new Union would have to avoid the

tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). *See generally* The Federalist No. 42 (Madison), p. 267 (C. Rossiter ed. 1961) ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience"). "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, ... has as its corollary that the states are not separable economic units." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949).

The District's Act breaches the Commerce Clause's limits on the extraterritorial reach of State power and necessarily assumes for itself the national power delegated to Congress. Specifically, as noted, the Act imposes upon manufacturers of certain types of firearms the District has labeled "assault weapons" or "machine guns" absolute liability for any injuries caused by those firearms within the District – *i.e.*, liability regardless of fault, defect or nexus to illegal conduct. In the end, the only way for a manufacturer to avoid liability under the Act is to abandon altogether the lawful manufacture and sale of the firearms covered by the Act anywhere in the United States (or elsewhere) or, in the case of "assault weapons," to sell them only to law enforcement.[5] By forcing manufacturers to abandon or radically alter their lawful commercial activities in other States, on pain of facing absolute liability and incalculable damages in the District, the District is directly and substantially regulating interstate commerce in violation of the dormant Commerce Clause.[6] For this independent but

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[5] Section 7-2551.03 of the Act contains an "exemption" from liability for "assault weapon[s]" originally distributed to law enforcement agencies.

[6] The Act effectively imposes a tax upon out-of-State

related reason, this Court should grant certiorari and invalidate the Act.

III. THE ACT HAS BROAD IMPLICATIONS FOR NATIONAL COMMERCE THAT THIS COURT SHOULD ADDRESS AND CLARIFY

The implications of the Act are significant, particularly when one considers that product-based absolute liability statutes such as the Act need not be restricted to firearms. If allowed to stand, the Act could lead to a variety of similar State-specific, product-based absolute liability statutes that would adversely impact the economies of individual States and the nation. *See Healy*, 491 U.S. at 336 ("the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.").

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manufacturers for the simple act of having manufactured and sold – in States where it is legal to do so – articles of commerce i) of which the District disapproves and ii) that someone else illegally transported into the District. *See, e.g., W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) ("Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects."). The tax – in the amount of a contingent, undetermined future monetary liability – is both unquantifiable and completely outside the control of the sister-State manufacturer. It depends entirely upon whether i) someone chooses to commit a criminal act by bringing one of the prohibited firearms into the District, ii) that firearm is subsequently discharged (intentionally or accidentally) within the District, and iii) someone is injured within the District by that discharge. Each of these activities is outside the control of the manufacturers. The only way to avoid this contingent tax is to abandon the manufacture of the firearms encompassed by the Act.

In light of the District's imposition of absolute liability upon the manufacturer of certain firearms, for example, another state – "State X" – could decide to impose absolute liability upon the manufacturers of certain sport utility vehicles. Using the same logic as the District, State X's legislature could decide that certain SUVs are more likely than other vehicles to cause serious damage in an accident, and ban those SUVs within State X. That ban, however, would not prevent a motorist from illegally driving a prohibited SUV into State X. Accordingly, State X's legislature could impose absolute liability upon sister-State manufacturers of those SUVs for any injury caused by the SUVs in State X, thus giving those manufacturers an economic disincentive to continue manufacturing the SUVs. In retaliation, "State Y," where SUVs are manufactured, could then ban certain products that happen to be manufactured in State X and impose absolute liability upon the State X-based manufacturers of those products. In sum, product-based absolute liability statutes like the District's could become a basis for trade wars between the States. Indeed, if States have the power asserted by the District to regulate or obstruct lawful business activities in other jurisdictions, it is likely that the application of such power would inevitably create trade struggles among the States – causing substantial disruption to national commerce. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 151 (1978) ("local political units are expected to act in their constituents' interests," and will be "unresponsive to problems not felt by local constituents").

The Constitution specifically and clearly allocated to Congress responsibility for regulating the national economy precisely to avoid such trade wars. *See id.* at 151 n.16 ("The pursuit by each State of the particular interests of its economy and constituents [under the Articles of Confederation] nearly wrecked the national economy. 'The almost catastrophic results from this sort of situation were

harmful commercial wars and reprisals at home among the States . . . ." P. Hartman, State Taxation of Interstate Commerce 2 (1953), citing, *e.g.*, The Federalist, Nos. 7, 11, 22 (Hamilton), No. 42 (Madison)."); *Howard v. Ill. Cent. R. Co.*, 207 U.S. 463, 520 (1908) ("[T]he commerce which concerned more than one State, from its essential nature, was in part outside the territorial jurisdiction of any State, could not be governed efficiently by a single State, and, if left outside of the National control, would be subject to woeful embarrassment by the conflicting regulations of the several States into which it entered."). Congress was and is the "superintending authority over the reciprocal trade of the confederated States." The Federalist No. 42 (Madison). To ensure that Congress retains this control, this Court should review and invalidate the District's Act.

CONCLUSION

To preserve the appropriate constitutional relationships between one State and another, and to preserve for Congress its exclusive role in regulating the national economy, this Court should grant the petition, review the Act and strike it as unconstitutional.

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Supreme Court of the United States

BERETTA U.S.A. CORP., ET AL.

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

BERETTA U.S.A. CORP., ET AL.

Petitioners,

v.

BRYANT LAWSON, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are the National Association of Manufacturers and the Chamber of Commerce of the United States of America, two organizations that represent the interests of millions of United States businesses.

The National Association of Manufacturers ("the NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The Chamber of Commerce of the United States of America ("the Chamber") is a non-profit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the

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[1] Pursuant to U.S. Sup. Ct. Rule 37.3(a), letters of consent by all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, the National Association of Manufacturers and the Chamber of Commerce of the United States of America state that this brief was not authored in whole or in part by counsel for any party in this matter, and that no person or entity other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief. In the interests of full disclosure, however, the NAM and the Chamber note that their counsel of record has represented the National Shooting Sports Foundation in connection with constitutional issues such as those discussed in this brief.

Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The NAM and the Chamber (together, "the *amici*") seek to promote and protect interstate commerce for their members by ensuring that, consistent with the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, individual States do not erect barriers to such commerce. The District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990, D.C. Code § 7-2551.01 to 7-2551.03 (2001), is such a barrier. Accordingly, the *amici* respectfully request that this Court grant certiorari and invalidate the District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990, D.C. Code § 7-2551.01 to 7-2551.03 (2001).

SUMMARY OF THE ARGUMENT

The Constitution explicitly grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States...." U.S. CONST. art. I, § 8, cl. 3. This Court has consistently interpreted this clause to mean what it says: that Congress alone has the power to regulate interstate commerce and that State laws may affect interstate commerce in nothing more than an incidental fashion. The District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990, D.C. Code § 7-2551.01 to 7-2551.03 (2001) (the "Act"), contravenes these rules and, as a result, the decision below upholding the constitutionality of the Act should be reversed.

The Act imposes liability without fault upon companies that lawfully manufacture non-defective products in other States and sell them in interstate commerce. *See* D.C. Code § 7-2551.02. Because it encompasses only products that are illegal to manufacture or sell in the District, *see* D.C. Code § 7-2504.01 (2005), it necessarily applies only to out-of-State products that are illegally transported into the District by a

third-party and discharged there, causing an injury. Thus, conduct that may be legal in one State – the manufacture and sale of a firearm encompassed by the Act – is transformed into conduct that could subject manufacturers and sellers to absolute liability and unlimited damages in the District. In the end, the only way for a business to avoid liability under the Act is to abandon altogether the lawful manufacture and sale of the firearms covered by the Act anywhere in the United States.

The *amici* believe that the Act and the decision below have broad implications far beyond the firearms context in which they arose. The premise upon which the Act imposes liability – that the effects of out-of-jurisdiction conduct are felt within the District – can be applied to any transportable product. The business communities represented by the *amici* oppose this effects-based jurisdictional doctrine because, taken to its logical conclusion, it substantially dilutes – and tends towards abolishing – the Constitution's restrictions on State power over interstate commerce.[2]

The *amici* believe that the Act and the decision below, if left intact, would permit one State to impose rules making it unprofitable to conduct business outside that State – *i.e.*, throughout the rest of the nation. Alternatively, different States could impose a patchwork of conflicting regulations that would inhibit the ability to conduct business nationwide. The business communities represented by the *amici* do not believe that this vision of State power is consistent with the intent of the Framers of the Constitution.

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[2] Although the District is not a State, *amici* will refer to the District herein as if it were a State. *See* D.C. Code § 1-203.02 (2005) (Congress's grant of authority to the District was "subject to all the restrictions and limitations imposed upon the states" by article I, § 10 of the Constitution).

ARGUMENT

The Constitution delegated to Congress the power, *inter alia*, to regulate interstate commerce and restricted the power of the individual States to do so. Because the District's Act improperly regulates national commerce, this Court should review the decision below, invalidate the Act, and reverse.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DISTRICT'S ACT BECAUSE IT REGULATES AND BURDENS COMMERCE OCCURRING ENTIRELY IN OTHER STATES

The Act upheld in the decision below is unconstitutional under the Commerce Clause. The Commerce Clause empowers only Congress to "regulate Commerce ... among the several States." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has long held that the Commerce Clause limits the power of State and local governments to take actions affecting foreign and interstate commerce. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 326 n.1 (1989). In particular, this so-called "dormant Commerce Clause" restriction prohibits state governments from controlling commerce occurring wholly outside of their jurisdictions. *Id.* at 336, 337 n.14. The Supreme Court in *Healy* summarized the Commerce Clause's prohibition on such extraterritorial action as follows:

> First, the Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State. ... Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was

> intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

491 U.S. at 336-37 (internal citations and quotations omitted). The Supreme Court has repeatedly condemned such extraterritorial action as *per se* unconstitutional. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (striking as *per se* invalid a price affirmation statute requiring New York liquor sellers to charge prices no higher than those charged to customers outside New York; "[w]hile New York may regulate the sale of liquor within its borders, ... it may not ... [']regulat[e] the price' to be paid for liquor in those States"); *Edgar v. Mite Corp.*, 457 U.S. 624, 626-27, 643-46 (1982) (striking as *per se* invalid Illinois law allowing Illinois official to evaluate tender offer for shares of an Illinois company, regardless of existence of Illinois shareholders). The Act is *per se* unconstitutional under the dormant Commerce Clause, because it imposes liability upon out-of-State businesses for lawfully manufacturing and/or selling in those jurisdictions certain products of which the District disapproves.

The Commerce Clause gives to Congress and Congress alone the power to regulate the national market in products – whether those products are firearms, SUVs, or refrigerators. The explicit purpose of this delegation was to correct one of the most glaring failures of the Articles of Confederation: the imposition of laws by several States that impeded the interstate flow of commerce. *See Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (the Framers granted Congress plenary authority over interstate commerce in "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."); *see generally* The Federalist No. 42 (Madison), p. 267 (C. Rossiter ed. 1961) ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience").

The District's Act defies the Commerce Clause's limits on State power and necessarily assumes the national power delegated to Congress. Specifically, while the Act purports to impose "strict liability," the statute's language imposes absolute liability – *i.e.*, liability regardless of fault or defect – upon the manufacturers of certain types of firearms for any injuries caused by those firearms within the District. The firearms that fall within the broad sweep of this Act – firearms the District has chosen to define as "assault weapons" or "machine guns" – cannot lawfully be sold within the District, but they can be and are lawfully manufactured and sold in other jurisdictions. By so imposing liability without fault upon out-of-State manufacturers, the District's Act seeks to and does regulate commerce existing entirely outside the District's borders.

Thus, conduct that may be legal in one State – the manufacture and sale of a firearm encompassed by the Act – could nevertheless subject the manufacturer to absolute

liability and unlimited damages in the District whenever one of the manufacturer's products, through no fault of the manufacturer and solely because of the illegal conduct of criminals, is brought into the District and misused there. In the end, the only way for a manufacturer to avoid liability under the Act is to abandon altogether the lawful manufacture and sale of the firearms covered by the Act anywhere in the United States (or elsewhere) or, in the case of "assault weapons," to sell them only to law enforcement.[3] By forcing manufacturers to abandon or radically alter their commercial activities in other States, on pain of facing absolute liability and incalculable damages in the District, the District is directly regulating interstate commerce in violation of the dormant Commerce Clause.

While it purports to impose "strict liability," the Act goes far beyond the "strict liability" statutes and common law of other States, and imposes liability without proof of fault or defect. Under the common law of the District, as well as virtually every other jurisdiction, strict liability applies when a product "defect" causes an injury. *See, e.g., Webster v. Pacesetter, Inc.*, 259 F. Supp. 2d 27, 30 (D.D.C. 2003). In stark contrast to these strict liability principles, however, the Act does not require any proof of defect. Rather, the Act attaches liability to the out-of-State manufacture or sale of non-defective products of which the District disapproves. In short, the Act departs radically from the modern view of "strict liability" as reflected in the Restatement and the product liability law of many jurisdictions.

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[3] The Act contains an "exemption" stating that "[n]o assault weapon originally distributed to a law enforcement agency or a law enforcement officer shall provide the basis for liability under this subchapter." D.C. Code § 7-2551.03.

II. THE ACT HAS BROAD IMPLICATIONS FOR THE REGULATION OF NATIONAL COMMERCE THAT THIS COURT SHOULD ADDRESS AND CLARIFY

The implications of the Act and the decision below are enormous. While the Act relates specifically to firearms, the concept underlying the Act – imposing absolute liability upon disfavored out-of-State products – need not be restricted to firearms. Thus, if allowed to stand, the Act and the decision below could lead to similar product-based absolute liability statutes restricting commerce in any number of products. *See Healy*, 491 U.S. at 336 ("the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation"). The *amici* support the petition for certiorari because the decision below upholding the Act's constitutionality has important implications for the business communities the *amici* represent.

Over the last decade, States have been placing increased burdens upon interstate commerce. In particular, some States have tried to extend civil liability to conduct that occurs outside State borders, blocked only by this Court. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (invalidating State court punitive damage award based in part on out-of-State conduct); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) (same). The District's Act here, however, goes much further than the jury verdicts invalidated in *Gore* and *Campbell*. The Act imposes liability upon manufacturers and sellers of products that are illegal to manufacture and sell in the District, *see* D.C. Code § 7-2504.01, such that the Act necessarily imposes liability solely upon conduct that occurs